Supreme Court of the United States

OCTOBER TERM, 1909

No. [redacted] 219

D. L. HENDERSON,
Trustee in Bankruptcy of

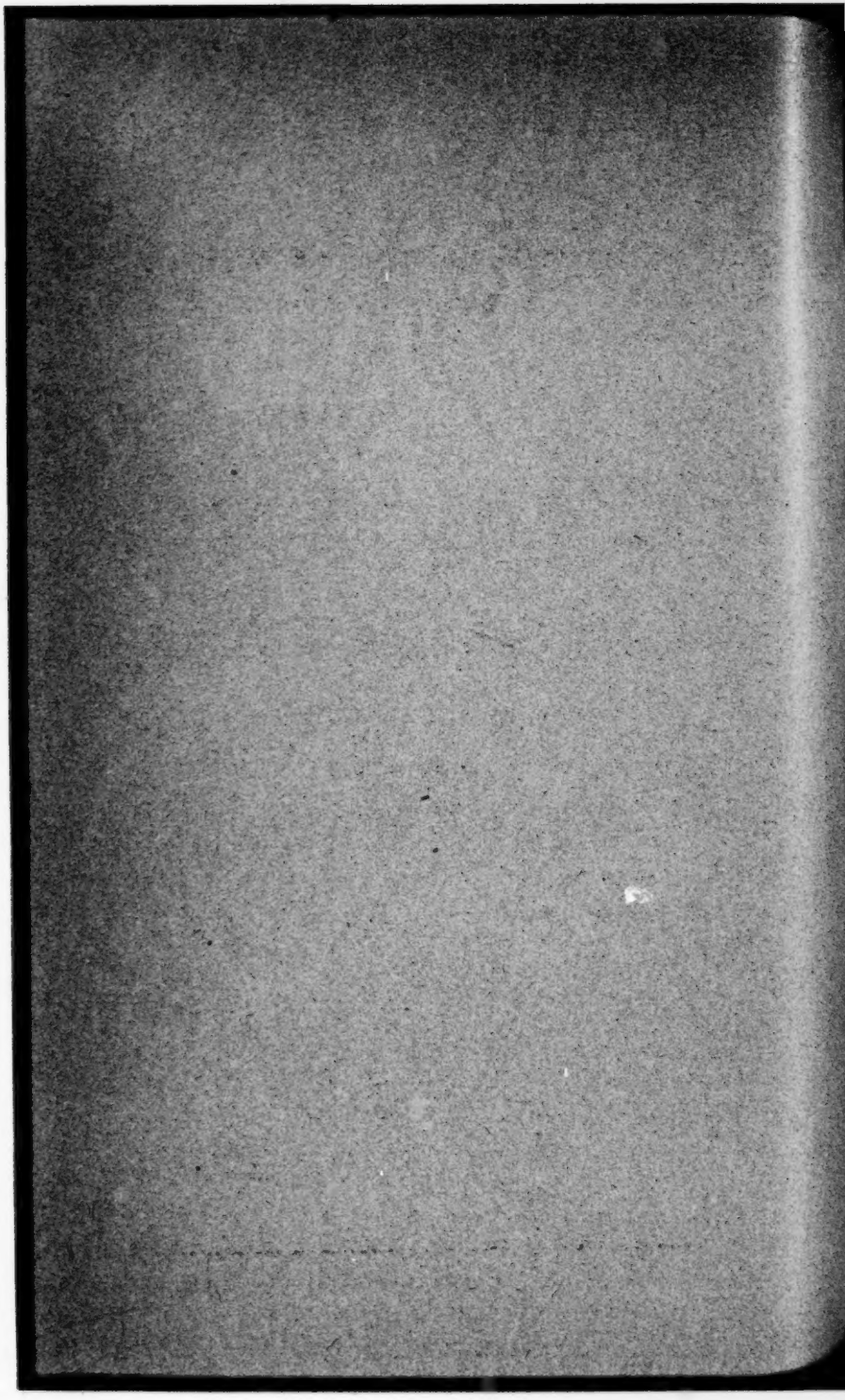
JOSEPH BURNS, Bankrupt,
Petitioner

Versus

SAM MAYER,
Respondent

PETITION FOR WRIT OF CERTIORARI

JNO. R. L. SMITH,
ISAAC HARDEMAN,
GEO. S. JONES,
M. P. CALLAWAY,
BRUCE C. JONES,
E. P. JOHNSTON,
Solicitors and Attorneys for Petitioners.



Supreme Court of the United States

OCTOBER TERM, 1909.

No. .....

D. L. HENDERSON, Trustee in Bankruptcy of Joseph Burns, Bankrupt, PETITIONER,

Versus

SAM MAYER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI,

requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for review and determination the case of D. L. Henderson, Trustee, versus Sam Mayer.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of D. L. Henderson as Trustee in Bankruptcy of Joseph Burns, Bankrupt, respectfully shows:

FIRST.

Petitioner is a resident and citizen of the State of Georgia, and is the Trustee duly qualified and acting in the case of Joseph Burns, Bankrupt, in the District Court of the United States for the Western Division of the Southern District of Georgia.

NATURE OF THE CASE.

SECOND.

In December, 1907, Sam Mayer as landlord, rented to Joseph Burns a certain plantation and a certain storehouse in Georgia, for which Joseph Burns agreed to pay as rental, on October 1, 1908, seven hundred dollars for the plantation, and three hundred dollars for the storehouse.

THIRD.

On November 13, 1908, Sam Mayer sued out in the proper court of the State two distress warrants, in which proceedings he claimed a special landlord's lien upon the crops raised on the plantation, and a general landlord's lien upon all the property of his said tenant, and these distress warrants were duly levied on the same day upon the crops and upon certain other property.

FOURTH.

Within four months thereafter Joseph Burns was duly adjudicated a Bankrupt, in the District Court of the United States for the Western Division of the Southern District of Georgia, and petitioner, D. L. Henderson, was elected and qualified as Trustee, and as such took possession of the property levied upon under the distress warrants.

FIFTH.

Thereupon Sam Mayer filed with the Referee in Bankruptcy having jurisdiction therein, his intervening petition, wherein he prayed that the proceeds of the property so levied upon be paid over to him by the Trustee, and that the liens claimed by him be adjudged to be entitled to priority out of such proceeds.

ACTION IN DISTRICT COURT.

SIXTH.

The Honorable Referee adjudged and decreed that said Sam Mayer as landlord had a valid lien enforceable in Bankruptcy upon the crops, by virtue of his special landlord's lien, and that the proceeds of said crops, amounting to $414.38, be paid over to him upon his claim for $700.00 for rent of the plantation; but denied his claim to a general lien, for the balance due for rent of the plantation, and for the rent of the storehouse, upon the other property levied upon, holding and adjudging that the landlord's general lien in Georgia originates in the levy of the distress warrant, and that the bankruptcy of the said Joseph Burns within four months thereafter avoided such lien.

SEVENTH.

Sam Mayer thereupon filed his petition for a review of the Referee's said order and, upon a hearing thereof, the Honorable District Court reversed the Referee's order and directed the Referee "to sustain said lien as a valid lien upon the property described in said levies, and to order that the proceeds of the property arising from the sale of said property be applied to the payment of said lien claimed under said two distress warrants."

ACTION IN CIRCUIT COURT OF APPEALS.

EIGHTH.

Petitioner filed in the United States Circuit Court of Appeals for the Fifth Circuit a petition to superintend and revise the said judgment and order of the District Court, and contended therein that under the law of

Georgia the landlord's general lien is a lien obtained through legal proceedings, and that the levy of the distress warrant to create and enforce such lien is a levy within the meaning of Section 67(f) of the Acts of Congress relating to Bankruptcy, and that said lien and said levy having been obtained in this case within four months prior to bankruptcy, were therefore void and should have been so declared.

Ninth.

The said Circuit Court of Appeals, on the 25th day of October, 1909, denied said petition to superintend and revise, but rendered no opinion in connection therewith.

QUESTIONS OF GENERAL IMPORTANCE INVOLVED.

Tenth.

The question involved is whether or not a landlord is entitled to priority of payment out of a bankrupt's assets, merely by virtue of the relation of landlord and tenant existing between them.

The levy of the distress warrant in the case at bar is of no consequence, for the proceedings under which the levy was made were commenced within four months prior to the commencement of the bankruptcy proceedings.

The question is of general importance especially in the State of Georgia, and a determination thereof is essential to a uniform construction of the Act of Congress in relation to Bankruptcy throughout the United States.

a. Because Section 64(a) of said Act guarantees priority to "debts owing to any person who by the laws of the States or of the United States is entitled to priority," and the decision of the Circuit Court of Appeals ignores and is contrary to the decisions of the Court of last resort in Georgia construing the Statute of this State

regulating the rights of landlord and tenant, and said decision establishes a priority in Bankruptcy administration which is not authorized by the laws of the State or of the United States. If this is permitted, creditors in all bankruptcy causes are left at sea as to their rights "without compass or rudder," and the courts administering bankruptcy law may, according to the diverse views of the various courts, establish equitable liens.

b. Because nearly every bankrupt owes his landlord, in Georgia and elsewhere, and the rights of such landlords should be authoritatively declared to depend upon the law of the state of the bankrupt's residence, and entitled to a lien only where the law of the State so declares.

c. Because the State of Georgia is divided into two judicial districts, and in the Northern District, the District Court denies the landlord's right to priority, while in the Southern District this right is recognized by the District Court. The Circuit Court of Appeals, having rendered no opinion, thereby adopted the opinion of the District Court for the Southern District, which in effect confers on the landlord an equitable lien for his rent, contrary to the Statute Law and the decisions of the highest courts in the State.

Eleventh.

The importance of the questions involved is recognized in the opinion of the District Court, in the following language:

> "This question is an exceedingly important one, affecting as it must do the values of all lands. If it be true that under the law of Georgia the lien of the landlord must be dissolved in favor of general creditors, the most calamitous results would follow in the diminution of the value of land, the income of land owners, and especially the owners of farm lands. It is said in argument that the contrary view has been recognized since the act went into effect, but the question

has never previously been presented here. The rule of the State on this subject is enacted to conserve that great prosperity which flows from the stable and high value of landed property. It but makes effective the ancient right of the landlord, which, as contended by his counsel, comes down from feudal times, indeed, from the 'time whereof the memory of man runneth not to the contrary.'"

BRIEF IN SUPPORT OF PETITION.

TWELFTH.

The law of Georgia upon the question is without conflict, and is embodied in the following quotations:

"The following liens are established in this state

2. Liens in favor of creditors by judgment and decree.

4. Liens in favor of landlords."

Code of Georgia (1895) §2787.

"Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes, to which they shall be inferior, and shall also have a general lien on the property of the debtor, liable to levy and sale, and such general lien shall date from the time of the levy of a distress warrant to enforce the same."

Code of Ga. (1895) §2795.

"Such general lien of landlord shall be inferior to liens for taxes and the general and special lien of laborers, but shall rank with other liens and with each other according to date, *the date being from the time of levying a distress warrant.* The special liens of landlords for rent shall date from the maturity of the crops on the lands rented, unless otherwise agreed on, but shall not be enforced by distress warrant

until said rent is due, unless the tenant is removing his property, or when other legal process is being enforced against said crops, when the landlord may, as provided elsewhere in this Code, enforce said liens, both general and special."

Code of Ga. (1895) §2796.

"Any person who may have rent due may, by himself, his agent, or attorney, make application to any Justice of the Peace within the county where his debtor may reside, or where his property may be found, and obtain from such Justice a distress warrant for the sum claimed to be due, on the oath of the principal, his agent or attorney, in writing, for the said rent, which may be levied by any constable duly qualified, on any property belonging to said debtor, whether found on the premises or elsewhere, who shall advertise and sell the same, as in case of levy and sale under execution."

Code of Ga. (1895) §1818.

"The landlord shall have power to distrain for rent as soon as the same is due, or before due if the tenant is seeking to remove his goods from the premises."

Code of Ga. (1895) §3124.

"The landlord's lien for his rent shall attach from the time of levying his distress warrant, but it shall take precedence of no lien of older date except as to the crop raised on the premises."

Code of Ga. (1895) §3125.

The language of the statutes is plain: "Such general lien shall date from the time of the levy of a distress warrant to enforce the same," "shall attach from the time of levying his distress warrant," and the Georgia Court uniformly has construed the statute according to its plain meaning.

"We do not think," says Judge McKay, 'that, even at the common law, or under any English statute before we adopted the

> English law, the landlord had a lien on his tenant's property, as against a purchaser from him, during the term. But even if this were so our law regulates their rights very differently. The lien of the landlord, except on the crop *does not commence* until his distress warrant issues."
>
> Hobbs vs. Davis, 50 Ga., p. 214.
>
> "Prior to the Acts of 1873," (Code §2795) "the landlord, in the absence of any contract to that effect, had no lien on the crops of the tenant for his rent, *before* the levy of a distress warrant."
>
> Johnson vs. Emanuel, 50 Ga. p. 590.
>
> "The only difference between the lien of an ordinary common law judgment, and that arising under an uninterrupted distress warrant, is that the former binds the property of the defendant from its date, and the latter *from the time of the levy*. They both have the same general lien on the defendant's property, as qualified above."
>
> Elam vs. Hamilton, 69 Ga., p. 736.

How fallacious is the argument which seeks to distinguish the landlord's general lien from the general judgment lien or the attaching creditor's lien. Both require a judgment of a court to give them any genesis, life or validity.

The present Bankruptcy Act is broad in its terms, and invalidates "all levies, judgments, attachments or other liens obtained through legal proceedings."

Bankruptcy Act § 67(f).

The argument seems unanswerable, the conclusion irresistible. The landlord's lien "commences" with the levy of a distress warrant. A distress warrant is a "legal proceeding." The landlord therefore obtains his lien through a legal proceeding Bankruptcy avoids it.

Not so the special lien on the crop, which dates from the maturity of the crop.

One Georgia case needs to be distinguished, a case under the Bankruptcy Act of 1867.

In place of § 67 (f) in the Act of 1898, § 14 in the Act of 1867 dealt with liens, and under that Act mesne process only was invalidated.

Bankruptcy Act 1867, § 14.

Considered in the light of this change in the law, the case of "Loudon vs. Blandford" distinguishes itself, for it avoids attachments which are mesne process, and recognizes as valid general judgments, distress warrants and contract liens such as mechanics' liens.

Loudon vs. Blandford, 56 Ga., p. 150.

The law as administered in the Southern District of Georgia is set out in the opinion of the Honorable District Judge, which appears in the record.

The law as administered in the Northern District of Georgia is recognized in the case of

Re. D. H. Daugherty Co., 109 Fed., p. 480,

and elaborated in the opinion of the Honorable District Judge for that District in the case of M. C. Vandiver, not reported; but a certified copy of the opinion is embodied herein.

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

In re.

M. C. Vandiver, In Bankruptcy.

Bankrupt.

Intervention of V. H. Kreigshaber.

This is an intervention in the above stated bankruptcy case of M. C. Vandiver, asking priority of payment of certain rent due the intervenor. The referee finds the Intervenor not entitled to priority, and the matter is brought here for review. The report of the Referee is as follows:

'In the above stated case on August 22, 1908, a claim was filed by V. H. Kreigshaber, claiming a balance of $134.00 rental of premises occupied by the bankrupt: the said balance being claimed as a prior lien on the funds in the hands of the trustee,

Fair Dodd; the said claim representing two months' rental due claimant by said bankrupt, and which claim, under the laws of Georgia, is given priority of payment, etc.

Objections were filed to this claim by the trustee, denying that said claim was entitled to priority of payment.

This is the first time that a claim of priority of rental of this character has been made in this district.

The Code of Georgia (Sec. 2795 'Landlord's lien') sets out that

"Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes, to which they shall be inferior, and shall also have a general lien on the property of the debtor, liable to levy and sale, and *such general lien shall date from the time of the levy of a distress warrant to enforce the same.*'"

The attorney for this claimant depends on cases from the States of Pennsylvania and South Carolina and other states having practically the same state laws with respect to landlord's right to priority of payment of rent out of the chattels of the tenant. In Pennsylvania and South Carolina it is provided that landlords shall be entitled to the payment of rents accrued or to accrue for a period of twelve months, and in those states it has been held that before an ordinary execution creditor can levy his fi. fa. upon the chattels of the tenant such creditor must first tender to the landlord an amount in cash equal to twelve months' rental of the premises.

This is not the law in Georgia, and this section of the Code above quoted does not give landlords' priority of payment under Sec. 64 (5) of the Bankruptcy Act. Under the Georgia law, the statute does not give a claim for the payment of rent priority, except subject to provision by the statute, which authorizes the levy of a distress warrant, and which becomes a lien

from the date of the levy, and even the landlord only obtains a lien, which can be and is dissolved by bankruptcy proceedings, if such lien is not more than four months old at the time of the intervention in bankruptcy.

In the case before us no distress warrant has been levied, and the lien claim has never begun to exist. Even had a distress warrant been levied, this has been decided by the Judge of the District Court, Northern District of Georgia, in the case of George Adair, Agent, vs. D. H. Dougherty & Co., in which case a distress warrant has been levied on the stock of goods and fixtures belonging to the bankrupt company. A little later a petition in involuntary bankruptcy was filed against D. H. Dougherty & Co., and its property went into the possession of an officer of the Court, a Receiver, and later the company was adjudicated a Bankrupt. In this case the Judge of the District Court says: 'The difficulty about this contention is that the rent appears to have been past due in each instance before the distress warrant was taken out. I am unable to see any distinction between this and any other lien obtained within four months and which is dissolved by the Bankruptcy Act. Petition to have lien allowed denied."

"Section 64 of the Bankruptcy law enumerating the classes of debts which have priority, and which are to be paid in full out of bankrupt estates, says 'Debts owing to any person, who, by the laws of the States or of the United States is entitled to priority.'

Now, under the Georgia Law (Code Sec. 2795) a landlord's debt is not entitled to priority of payment over an ordinary execution creditor, who obtains his judgment before the levy of a distress warrant for rent is made, and any debt owing the landlord under the laws of Georgia is not entitled to priority, except where the landlord avails himself of the benefits of the

statute by levying a distress warrant, which fixes the date of his lien; but, as to the present claim under discussion, even had a distress warrant been levied, this question of priority has been settled in the case above cited by the Judge of our District Court.

Sec. 3125 of the Code of Georgia provides: 'The Landlord's lien for his rent shall attach from the time of levying his distress warrant, etc.' This has always been the recognized law of Georgia. This was assumed, though it was not decided, in the brief opinion filed in re. Dougherty & Co., 109 Fed. 180, because the fact that such was the law was probably not questioned in that case.

I do not think that any of the authorities cited by the industrious counsel for the intervenor would have any bearing on the question in this state. No lien exists in favor of the landlord until the time of levying his distress warrant, and consequently, there is no ground for holding that he is entitled to any priority of claim. The Referee correctly decided the matter and his decision is approved.

This 5th day of October, 1908.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office 5th day of Oct. 1908, at 5 o'clock P.M.

W. C. CARTER, Clerk.
By F. L. Beers, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

UNITED STATES OF AMERICA.
NORTHERN DISTRICT OF GEORGIA

I, W. C. Carter, Clerk United States District Court for the Northern District of Georgia, do hereby certify that the foregoing two pages are a true, correct, complete and full copy of the original OPINION OF COURT, in the matter therein stated, of record and on file in my office at Atlanta, Georgia.

In testimony whereof I hereunto set my hand and affix the Seal of the said Court, at Atlanta, Georgia, this the 5th day of October, A.D., 1909.

(Signed) W. C. CARTER,
Clerk United States District Court, Northern District of Georgia.
[Seal attached]."

NOTICE OF APPLICATION.

THIRTEENTH.

Due notice of this application has been given to Sam Mayer, Esquire, the opposite party in the Court of Appeals, his Attorney of Record having died since the decision of that Court was made.

Wherefore petitioners pray that their petition for a writ of certiorari be granted.

JNO. R. L. SMITH,
ISAAC HARDEMAN,
GEO. S. JONES,
M. P. CALLAWAY,
BRUCE C. JONES,
E. P. JOHNSTON,
Solicitors and Attorneys for Petitioners.

UNITED STATES OF AMERICA.
SOUTHERN DISTRICT OF GEORGIA.

D. L. Henderson being duly sworn says that he is the petitioner named in the foregoing petition, and that he has read said petition, and that the facts stated therein are true.

D. L. HENDERSON.

Subscribed and sworn to before me this.....day of February, 1910.

A. E. JORDAN,
Notary Public Dooly County, Ga.
[Seal attached.]

UNITED STATES OF AMERICA.
SOUTHERN DISTRICT OF GEORGIA.

To Sam Mayer, Esquire:

You are hereby notified that on Monday, the 14th day of March, 1910, the undersigned will cause to be submitted to the Honorable the Supreme Court of the United States a petition for a writ of certiorari, requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the said Supreme Court for its review and determination the cause in said Circuit Court of Appeals entitled D. L. Henderson, Trustee, petitioner, vs. Sam Mayer, respondent, Number 1961.

D. L. HENDERSON, Trustee,
By Geo. S. Jones,
his Attorney of Record.

UNITED STATES OF AMERICA.
SOUTHERN DISTRICT OF GEORGIA.

In person appeared before the undersigned, Geo. S. Jones, who being duly sworn deposes and says he has this day served Sam Mayer with the foregoing notice,

by delivering to him in person a copy thereof. This 25th day of February, 1910.

GEO. S. JONES.

Sworn to and subscribed before me this.....day of February, 1910.

E. C. SCOTT,
Notary Public Bibb County, Ga.
[Seal attached.]